

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 7, 2008

STATE OF TENNESSEE v. REX WILMORE

Direct Appeal from the Circuit Court for Robertson County
No. 06-0413 John H. Gasaway, III, Judge

No. M2007-02801-CCA-R3-CD - Filed November 24, 2008

In a bench trial, the Defendant-Appellant, Rex Wilmore (hereinafter “Wilmore”), was convicted of cruelty to animals and vandalism over \$500 and was subsequently sentenced to one year on probation and ordered to pay restitution. On appeal, Wilmore argues that his waiver of the right to a jury trial was invalid because he waived the right unknowingly. Following our review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ joined.

Edward T. Farmer, Springfield, Tennessee, for the appellant, Rex Wilmore.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; John W. Carney, Jr., and Robert S. Wilson, Deputy District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts. On July 19, 2006, Wilmore was charged with one count of cruelty to animals and one count of vandalism over \$500 for striking a dog with his vehicle. Prior to his bench trial, Wilmore, his attorney, and the trial judge signed a waiver of trial by jury form. At the bench trial, the State and the defendant presented proof. Wilmore testified on his own behalf, answering questions posed to him on direct and cross-examination, and explained how the incident occurred. At the conclusion of the trial, the trial judge found Wilmore guilty of both crimes as charged. The trial court merged the convictions for cruelty to animals and vandalism over \$500 and sentenced Wilmore to one year on probation and restitution to the dog’s owner.

ANALYSIS

On appeal, Wilmore challenges the validity of his signed waiver of trial by jury. Specifically, Wilmore asserts that his waiver was not knowingly executed because he could not read what he was signing or hear the advice of his trial counsel. The State contends that the record demonstrates that Wilmore knowingly and intelligently waived his right to a trial by jury.

The United States and Tennessee Constitutions guarantee an accused the right to a jury trial. U.S. Const. amend VI; Tenn. Const. art. 1, § 6. In State v. Bobo, 814 S.W.2d 353, 359 (Tenn. 1991), our supreme court recognized that an accused can waive the right to have a jury trial, “provided the waiver is made in accordance with the safeguards provided by the constitution and implementing statutes or rules of criminal procedure.” See also State v. Durso, 645 S.W.2d 753, 758 (Tenn. 1983). Our rules of criminal procedure provide that a defendant’s waiver of a jury trial must be in writing, consented to by the district attorney general, and approved by the court. See Tenn. R. Crim. P. 23. “This writing requirement is designed to impress the defendant with the gravity of the right relinquished and provide the best evidence of the defendant’s voluntary consent.” United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983). As with other constitutional rights, the waiver of this right must be knowingly executed. See State v. Blackmon, 984 S.W.2d 589, 591 (Tenn. 1998). On appeal, this court is bound to accept the trial court’s factual findings unless the evidence preponderates against those findings. State v. Kelly, 603 S.W.2d 726, 729 (Tenn. 1980).

In the instant case, it is undisputed that the defendant executed a written waiver of trial by jury on July 12, 2007. This writing is illustrative of Wilmore’s knowing, intelligent, and voluntary waiver. See Kenneth J. Jones v. State, No. M2007-00397-CCA-R3-PC, 2008 WL 271909 at *6 (Tenn. Crim. App., Feb. 1, 2008), perm. to appeal denied (Tenn. 2008). Although Wilmore now asserts that he had trouble with his vision, he had no difficulty describing a photograph shown to him during the trial. In denying the defendant’s motion for a new trial, the trial court held:

Well, the burden is upon Mr. Wilmore to convince the Court that he did not understand his actions when he executed the waiver. The waiver’s been executed by everybody involved; it was executed by Mr. Wilmore, it was executed by [defendant’s counsel], by [the State] and by this Court. The Court is not satisfied that he has -- the Court is not convinced that he has satisfied his burden.

Although the waiver form attached in the record does not indicate that the State actually signed the form nor was there space provided for the State’s signature, formal compliance with Rule 23 demands only that a written waiver is executed by the defendant. State v. Kenneth Maurice Vaughn, No. M2001-03091-CCA-R3-CD, 2003 WL 141059 at *4 (Tenn. Crim. App., Jan. 15, 2003). The transcript of the trial indicates the State’s consent to the waiver. The waiver form was executed by Wilmore, Wilmore’s counsel, and the trial judge and consented to by the State. Therefore, Wilmore’s waiver of his right to trial by jury comported with Rule 23 indicating a knowing and intelligent waiver. See Tenn. R. Crim. P. 23.

Wilmore additionally asserts that he “could not hear with any reasonable degree of certainty the advice [on the right to waive a jury trial] or the instruction[s] trial counsel [gave] him.” Although unclear from the record when Wilmore received advice regarding his right to a jury trial, before the trial began, the trial court stated “[T]he Defendant, Mr. Wilmore, having executed along with the State, this waiver of trial by jury, . . . the Court is prepared to try the case.” The trial court then acknowledged, “I think Mr. Wilmore is having problems hearing” and instructed everyone to “speak up . . . into the amplifying mic[rophone].” Wilmore did not indicate any difficulty hearing the court or answering questions posed to him during his direct examination. At one point, during the State’s case in chief, based on Wilmore’s hearing problems, defense counsel requested permission to step outside of the courtroom to confer with Wilmore privately. When they returned, Wilmore continued to participate in the bench trial without any indication that there was a problem with communication or the bench trial proceedings. At the beginning of his cross-examination, Wilmore stated, “I am having a little trouble hearing you.” In response, the State repeated the question, Wilmore answered, and the cross-examination continued with Wilmore answering over thirty questions without indicating any difficulty hearing. A review of the direct and cross-examination questions and answers demonstrate Wilmore had no difficulty hearing or understanding the proceedings. Accordingly, the record does not support Wilmore’s contention that he was unable to appreciate the nature and consequences of the proceedings due to his poor eyesight and poor hearing. Therefore, Wilmore’s waiver of his right to a jury trial was valid.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

CAMILLE R. McMULLEN, JUDGE